No. 881

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

NOS. —— AND ——

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

PETER VERBEEM, doing business as PETERS CARTAGE, APPELLEE

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

DONALD GOUIN, doing business as DON'S TRANSPORTS AND CARTAGE, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan, Southern Division, 154 F. Supp. 431, is appended hereto in Appendix A, *infra*, pp. 23-30. The Orders of Permanent Injunction entered pursuant to said decision in the instant causes are attached hereto in Appendix B-1 and B-2, *infra*, pp. 31-34. The report and order of the Commission, Division 1, dated October 18, 1955, entitled MC 114-663, *Peter Verbeem Common Carrier Application*, and the orders of the Commission of March 26, 1956, and August 28, 1956, denying petitions for reconsideration, all unreported, are appended as Appendices C-1, C-2 and C-3, *infra*, pp. 35-39. The report and order of the Commission, Division 1, dated December 23, 1955 entitled MC 114-807, *Donald Gouin Common Carrier Application*, and the orders of the Commission of May 3, 1956, and August 24, 1956, denying petitions for reconsideration, all unreported, are appended as Appendices D-1, D-2 and D-3, *infra*, pp. 40-46.

JURISDICTION

The Orders of Permanent Injunction entered by the District Court in these two causes were entered on September 16, 1957. These Appellants filed Notices of Appeal in each cause on November 14, 1957.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101(b), and is sustained by the following decisions:

Interstate Commerce Commission v. Parker, 326 U. S. 60;

American Trucking Associations, Inc. v. United States, 355 U. S. 141.

STATUTE INVOLVED

The instant cases at bar involved a construction of Section 203 (b)(8), of the Interstate Commerce Act, Public Act No. 255, 74th Congress, 49 Stat. 543 which reads in part, as follows:

> "• • • nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, • • •."

QUESTIONS PRESENTED

1. Did Congress intend that Section 203(b)(8) of the Interstate Commerce Act, which provides a limited exemption to the "transportation of • • • property in interstate and foreign commerce • • • between contiguous municipalities • • •", should apply to transportation between contiguous municipalities where one of such municipalities is located in a foreign country?

2. Did the District Court err in overturning the Interstate Commerce Commission's construction of Section 203 (b)(8) of the Interstate Commerce Act as made in *Com-*

mercial Zones and Terminal Areas, Ex Parte No. MC-37, 46 M. C. C. 665, where such construction was reasonable, consistent and practicable and had been continuously followed for over eleven (11) years?

STATEMENT OF CASE

The two appeals here under consideration find their origins in individual applications filed by Appellees with the Interstate Commerce Commission seeking authority as a common carrier by motor vehicle to transport general commodities, with certain exceptions not here material, between the International Boundary line at or near Detroit, Michigan, on the one hand, and, on the other, Detroit, Michigan.[1] Hearings were held on both applications before a Joint Board,[2] and the 13 Appellant motor carriers taking this appeal appeared at said hearings in opposition thereto. All parties were afforded full opportunity to submit evidence.

Thereafter, the Joint Board recommended a total denial of the Verbeem application for the reason that the preponderance of the evidence established that there was no need for additional motor carrier service, and the Joint Board in the Gouin application recommended a grant of authority limited to roofing and roofing materials and a denial of the rest of the application for the same reason underlying the denial in the Verbeem application.[3]

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[1] Verbeem filed his application on April 1, 1954; Gouin filed his on June 21, 1954.

[2] The Vebeem hearing was held on October 11, 1954; the Gouin hearing was held on January 25, 1955.

[3] In the Verbeem case on December 6, 1954; and in the Gouin case on February 24, 1955.

Verbeem filed Exceptions to the Joint Board recommendation, and, after Reply filed by Appellants, said Exceptions were denied by Division 1 of the Commission (Appendix C-1). Gouin likewise filed Exceptions to the Joint Board's recommended denial in part of his application, and Appellants filed Exceptions to that portion of the application acted upon favorably by the Joint Board. After reviewing all of the evidence, Division 1 of the Commission denied the application in its entirety (Appendix D-1).

Both Appellees, thereafter, filed Petitions seeking reconsideration by the entire Commission of the denials of the application, which Petitions were denied by the Commission on the grounds that the evidence adequately supported the findings of Division 1.[4]

Further Petitions for Reconsideration were filed by the Appellees[5] and denied.[6] Thereafter, on November 9, 1956, the Appellees filed their Complaints in the District Court.

It should be noted that both Appellees contended in their respective hearings that they had been engaging in the transportation of property by motor vehicle between Windsor, Ontario, Canada, on the one hand, and, on the other, Detroit, Michigan, for several years *prior* to the

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[4] Verbeem's Petition was denied on March 26, 1956 (Appendix C-2, *infra*); Gouin's Petition was denied on May 3, 1956 (Appendix D-2, *infra*).

[5] At no time during the lengthy proceedings before the Commission did Verbeem raise any question as to a claimed exemption under Section 203(b)(8) of the Interstate Commerce Act. This question was raised by Gouin for the first time in his second Petition for Reconsideration.

[6] Verbeem's second Petition was denied on August 28, 1956 (Appendix C-3, *infra*); Gouin's second Petition was denied on August 24, 1956 (Appendix D-3, *infra*).

filing of the applications with the Commission.[7] Also, both Appellees are domiciled in Canada.[8]

The two civil complaints were consolidated for hearing by the three-Judge District Court, and in its Opinion, rendered August 2, 1957 (Appendix A, *infra*), the Court held that Appellees' operations between Detroit and Windsor were operations in foreign commerce between contiguous municipalities within the meaning of Section 203(b)(8) of the Act and that the Commission should have dismissed the Appellees' applications for lack of jurisdiction, rather than denying them on the merits of their cases as made in the application proceedings. It should be noted that the Court affirmatively found that "there is no evidence that the Commission acted arbitrarily or capriciously" (Appendix A, *infra*, p. 24). In other words, the Court affirmatively ruled that the two complaints were not well founded insofar as they alleged that the Commission had acted contrary to the great weight of the evidence in denying said applications on their merits.

In ruling that Appellees' operations fell within the partial exemption of Section 203(b)(8) of the Act, the Court declined to accord any weight to the construction of Section 203(b)(8) afforded by the Commission in *Ex Parte No. MC-37, Commercial Zones & Terminal Areas*, 46 M. C. C. 665 (1946), wherein the Commission construed the statutory language "between contiguous municipalities" as not encompassing operations between two contiguous municipalities where one of same is located in a foreign country (See Appendix E for pertinent portion of said Opinion).

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[7] Verbeem claimed to commence his Detroit-Windsor operations in October, 1955; Gouin claimed to have commenced his Detroit-Windsor operations on February 7, 1946.

[8] Verbeem is domiciled in Windsor, Ontario, Canada; Gouin is domiciled at Tecumseh, Ontario, Canada, a suburb of Windsor.

THE QUESTIONS ARE SUBSTANTIAL

The case at bar poses an issue of such great importance as to warrant the plenary consideration of this Court; for, not only does it involve directly those national public considerations which prompted Congress to pass Part II of the Interstate Commerce Act, but, also, it is significantly related to our international trade relations with Canada and Mexico.

In *American Trucking Association v. U. S.*, 344 U. S. 298, at 312, 97 L. Ed. 337, 73 S. Ct. 307, this Court expressed those national interests underlying the Act and the evils sought to be eradicated as follows:

> "Then the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility. So, Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause."

The Appellees here contend, and the District Court so found that Appellees' motor carrier operations are privileged to the partial exemption provided in Section 203 (b)(8) of the Act. If such exemption is gained, though not intended by Congress, it is manifest that the legislative purpose shall have been thwarted and the remedial aspects of the Act frustrated. Thus, where a case presents for determination the basic question of applicability of the Act to motor carrier operations, substantial in quantity, it is respectfully urged that it is deserving of plenary

consideration by this Court. Otherwise, those very evils which Congress sought to remedy may be allowed to persist contrary to the public interest.

Appellees' motor carrier operations are clearly in foreign commerce and are, unless exempted by clear statutory language, subject to the full impact of the Interstate Commerce Act. In *Piedmont & Northern Railway Company v. Interstate Commerce Commission*, 286 U. S. 299, at 311, 76 L. Ed. 1115, this Court stated:

> "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason *exemptions from its sweep should be narrowed and limited to effect the remedy intended.*"

The District Court found that Section 203 (b)(8) provides a partial exemption for Appellees' operations and those of other carriers similarly situated. It ruled that the language "between contiguous municipalities" was intended by Congress to include a foreign municipality which is contiguous to a municipality in the United States

First, it is important to clarify the extent of the so-called partial exemption. Where Section 203 (b)(8) is applicable, the carrier need only comply with those "provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment". Thus, the carrier so exempted need not establish (1) that he is *fit, willing* and *able* to perform the service proposed and to conform to the provisions of the Act and the rules and regulations of the Commission, (2) that the proposed operation is required by the present or future public convenience and

necessity, or (3) establish just and reasonable rates for the protection of the shipping public.[9]

Having in mind this Court's statement in *American Trucking Association v. U. S., supra,* of the legislative purposes, it is apparent that the exempting operation of Section 203 (b)(8) encompasses the most basic remedial provisions of the Act. Thus, the breadth of the claimed exemption expresses the great importance of this case.

Secondly, the impact of the District Court's ruling is far-reaching from the standpoint of geographical application. The District Court itself noted that "It is common knowledge that the United States borders at Mexico and Canada are dotted with 'twin-cities' one of which is on each side of the border".[10] The effect of the District Court ruling is that motor carrier operations between these multitudinous "twin-cities" are freed from the sweep of the Interstate Commerce Act, except those provisions relating to safety of operations. Thus, the appealed from ruling has significance far beyond the Detroit-Windsor locale, and bears directly upon motor carrier operations between the United States and Canada and the United States and Mexico along the thousands of miles of common boundary shared by these countries.

In evaluating the significance of the issue posed in this case, consideration must be given to the purpose of Congress in creating the exemption for so-called commercial zone operations. Section 203 (b)(8) establishes the exemption for three situations, namely, where the transportation is conducted *wholly* within (1) a municipality, (2) between contiguous municipalities, or (3) within a zone

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[9] Section 207 and Section 216 of Act.

[10] See, Appendix A, *infra*, pp. 23-24.

adjacent to and commercially a part of any such municipality, or municipalities.

The Interstate Commerce Commission in *New York, N. Y., Commercial Zone*, 2 M. C. C. 191, at 192, stated that,

> "The purpose of exemption in Section 203 (b)(8) was to remove from Federal regulation operations which, although in interstate or foreign commerce, were nevertheless of a distinctively *local* or *urban* type, which we termed 'intraterminal' as distinguished from intercity or intercommunity operations."

By way of further amplification the Commission stated at page 192:

> "Those who framed this language clearly had in mind this conception of urban transportation when they used the words 'wholly within a municipality'. They realized, however, that there are many strictly urban communities which, from a governmental standpoint, are made up of two or more municipalities, so they added 'or between contiguous municipalities'. On reflection, it appeared that even these words might not be sufficiently comprehensive, so to cover all contingencies they further added the words 'or within a zone adjacent to and commercially a part of any such municipality or municipalities'. Implicit in the additions, however, is the conception, with which the framers started, of a single and distinctively urban community, 'wholly within' which motor-carrier operations would be of the local cartage or street-bus type."

In making this expression of the legislative intent inhering in Section 203 (b)(8), the Commission relied, in part, upon the explanation provided by Senator Wheeler, Chairman of the Committee on Interstate Commerce, when he stated in reference to Section 203 (b)(8) that "Pro-

vision is also made that regulation shall not apply to what may be termed *'intramunicipal'* or 'occasional' *operations* * * *". (Emphasis added.)[11]

Thus, the underlying factual conception in Section 203 (b)(8) is a commercially integrated area. The Commission has since 1935 undertaken to delineate individually the "commercial zone" with respect to many large municipalities in the United States such as New York, Detroit,[12] Chicago, etc., and in *Ex Parte No. 37, Commercial Zones & Terminal Areas, supra,* prescribed general rules for ascertaining such commercial zones for other cities not individually treated. In *Ex Parte No. 37 supra,* at p. 672, the Commission described this process as follows:

> "Actually, we do not 'create' or 'establish' any commercial zones, nor have we any power to 'extend' any exemption. A commercial zone about each municipality, within which motor transportation of the kind contemplated by section 203 (b)(8), is conducted, already exists by reason of trade practices, the uses to which the area is put, and geographical and political considerations. The existence of such zones is an economic fact."

If commercial integration, an economic fact depending on trade practices, geographical and political considerations, is the keystone to the Congressional purpose in Section 203 (b)(8), then the question is immediately raised in this case whether such integration between contiguous municipalities, each in a different country, could reasonably have been assumed to exist by Congress.

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[11] 79 Congressional Record 5651.

[12] 1st Supplemental Report to Ex Parte No. MC-37, Commercial Zones & Terminal Areas, 48 M. C. C. 95.

Where two cities, both in the United States, are contiguous, it is reasonable to assume in almost all instances that commerce and trade would freely flow uninhibited by municipal boundary lines. Similarly, where the two contiguous cities lie in two different states in the United States, trade and commerce would be largely unaffected by the state boundary line, and a single community, economically and commercially, would be the reasonable fact.

However, the application of this test to two contiguous municipalities, one in the United States and the other in Canada or Mexico, demonstrates the error of the grammatical construction afforded Section 203 (b)(8) by the District Court, who found no difference from a transportation standpoint between Windsor-Detroit motor carrier operations and motor carrier operations between Kansas City, Kansas, and Kansas City, Missouri, or between New York City and Newark, New Jersey.[13]

It must surely be apparent that the existence of the International Boundary line, with its consequent custom barriers, duties, immigration requirements, language differences along United States-Mexico Boundary, etc., effects such a decisive separation of those two cities as to preclude factually any accurate description of them as a "single community", or, in the language of Senator Wheeler, to describe motor carrier operations between such cities as "intramunicipal".

There can be no question with regard to the existence of interacting commercial influence between such cities as Detroit and Windsor, but there is a substantial difference between commercial influence and commercial integration.

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[13] See, Appendix A, *infra*, pp. 23-24.

In *New York, N. Y., Commercial Zone*, 1 M. C. C. 665, at p. 671, the Commission noted this important distinction:

> "As we stated in *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone*, 1 M. C. C. 656, decided concurrently herewith, for the purposes of section 203 (b)(8), *the commercial zone of a municipality and contiguous municipalities cannot be found to include all of the territory coming within the commercial influence of the municipalities.* Commercial zones defined under section 203 (b)(8) may include only those areas which are 'commercially a part' of municipalities and contiguous municipalities and are adjacent thereto. By restricting the commercial zones to areas which are adjacent to municipalities and contiguous municipalities, it is presumed that Congress intended to restrict such zones to those areas in which transportation by motor vehicle is in the nature of an intraterminal movement." (Emphasis added.)

An understanding of the Congressional intent in Section 203 (b)(8) is important at this point in this proceeding for it demonstrates the error committed by the District Court in its overly simplified, grammatical construction of the section. In *Piedmont & Northern Railway Co. v. Interstate Commerce Commission, supra*, this Court, in construing other provisions of the Interstate Commerce Act, at p. 311, stated that "* * * the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of words employed by Congress."

While it may be conceded that both Detroit and Windsor are municipalities and are contiguous, such an approach to construing Section 203 (b)(8) wholly ignores the reali-

ties that prompted passage of the Act and which give true substance and sense to its words.

The grave consequences of the appealed from decision are thus made clear in light of the Congressional intent underlying Section 203 (b)(8). If Congress only intended to create the partial exemption for local cartage within a single integrated community, it is apparent that the type of intercity, line-haul operations here involved are of the kind which Congress intended to be subject to the full impact of the remedial provisions of the Interstate Commerce Act. Yet, the effect of the District Court's decision is to return such operations conducted between great numbers of "twin-cities" to an unregulated status, except for safety provisions. While the District Court may well be right, and these Appellants in error, it is most strongly urged that this issue should be resolved by the Supreme Court.

It is also important to note that Section 203 (b)(8) does not exempt all transportation conducted wholly within a municipality or between contiguous municipalities, but only that portion which is *not* "under a common control, management or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone". In imposing this restriction upon the exemption, Congress clearly demonstrated its firm intent to protect the jurisdiction of the Commission and the legislative purposes motivating the Act. Furthermore, Congress provided that the Commission shall have the power to wholly set aside the exemption whenever, in the judgment of the Commission, such action is "necessary to carry out the National Transportation Policy declared in this Act".[14] This grant of power further evi-

[14] Section 203 (b) (7) of the Act.

dences the intent of Congress that the Commission is the tribunal most suited for determining what motor carrier operations are local in nature, not requiring total regulation, and those motor carrier operations which are intercity in nature, requiring full regulation.

The Interstate Commerce Commission in *Ex Parte No. MC-37, Commercial Zones & Terminal Areas,* 46 M. C. C. 665 (1946) gave thoughtful and thorough consideration to the issue herein presented and concluded that the statutory language "between contiguous municipalities" did not encompass foreign municipalities. This proceeding had been undertaken by the Commission on its own motion, and "nearly 1200 motor, rail and water carriers, forwarders, shippers, Chambers of Commerce, trade associations, and others" were parties of record.[15] The Commission recognized that there had not been "complete consistency" in the past on this point, but nevertheless, settled the matter as indicated, and that construction has been continuously adhered to from 1946 to the present date.

The District Court overturned the Commission's ruling in its opinion dated August 2, 1957, and it is apparent the District Court was largely motivated by a recommendation of the Commission in its 1955 Report to Congress that the Act be amended so as to exempt certain border city operation. It is somewhat anomalous that a recommendation for a legislative *amendment* can be persuasive of a *construction* of the statute which obviates the need for the proposed amendment. Rather, our customary rules of statutory construction would seem to say that a consistent, long standing, administrative construction, without Con-

[15] Ex Parte No. MC-37, Commercial Zones & Terminal Areas, *supra*, at 667.

gressional action altering such construction, lends strong support for the correctness of that construction.[16] Furthermore, the District Court seems to have ruled that Congress must expressly negate an intent to include foreign land, or acts committed therein, which ruling is contrary to *Sandberg v. McDonald*, 248 U. S. 185, at 196 where Justice Day referred to "the presumption that Congress intended to deal only with acts committed within the United States * * *."

Nevertheless, Appellants recognize fully that construction of legislative language rests finally with the judiciary; but, it is respectfully urged that the instant case of statutory construction possesses highly unusual factors. As noted above, the Commission is the agency with the peculiar knowledge and experience in dealing with a transportation analysis of the Act and, thus, is most suited for interpreting the statutory language within the framework of the realities of the transportation industry. Moreover, the Commission has been empowered by Congress to set aside the partial exemption and regulate the subject transportation to the fullest extent.

In view of these unusual factors, it is submitted that the District Court should have accorded more weight to the Commission's position in this proceeding. The 1955 legislative recommendation has never been renewed and, under such circumstances, cannot be construed as reflecting the present opinion of the Commission.

In overruling the Commission's construction of Section 203 (b)(8), the District Court found no merit to the con-

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[16] New York, New Haven & Hartford Railroad Co. v. I. C. C., 200 U. S. 360, 50 L. Ed. 515 (1906); Texas & Pacific Railway Co. v. Abilene Co. Hon Oil Co., 204 U. S. 426, 51 L. Ed. 553 (1907).

tention that enforcement of the Act will be made vastly more difficult under the construction contended for by Appellees. As noted above, the exemption *only* covers traffic moving between the two border cities which is *not* under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities or zone. Thus, traffic moving through Detroit, for example, from Chicago, Illinois, to a point in Canada under a through bill of lading would continue to be subject to the Act. Similarly, a shipment originating in Detroit for delivery to a point in Canada, except Windsor, under a through bill of lading would be fully regulated traffic. Undoubtedly, the great preponderance of traffic moving via motor carriers through ports of exit or entry such as Detroit or Buffalo would still be subject to the Act, and enforcement required.[17]

As long as all traffic moving between two border cities is fully regulated, enforcement of the Act is relatively simple. All vehicles, for example, entering Detroit from Windsor would then require the customary I. C. C. markings, and, inspection to ascertain this fact poses no problem. However, the appealed from ruling destroys this easy check and makes necessary an analysis of each individual shipment on each motor truck to determine the points of origin and destination and whether the shipment is moving under "common control, management, or arrangement".

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[17] Several of the Appellant motor carriers made a survey of all traffic handled by them for October, 1955, and March, 1956, which revealed that approximately 20% of such traffic falls within the exemption under the District Court's construction of Section 203 (b) (8) and the remaining 80% would still be subject to total regulation.

The District Court was unable to find any particular enforcement problem under these circumstances, and said the Commission, if necessary, "can consult the records of the plaintiffs with respect to shippers and consignees, and the consular invoices covering these shipments".[18]

Where the motor carriers in question are domiciled in Canada, *as are plaintiffs*, it is apparent that their records are unavailable to the Commission as it has no authority to compel their production. As to consular invoices, there is at least a substantial question as to their availability, usefulness and admissibility in a criminal proceeding, particularly if records of the Canadian Customs are involved. But, setting aside these considerations, it is submitted that the District Court's suggestions demonstrate the validity of the concern of the Commission and these Appellants if the District Court's ruling is not reviewed. That concern is that enforcement of the Act on traffic still subject to regulation is going to be made so difficult as to jeopardize an adequate enforcement program.

This Court is unequestionably aware of the limited staff and budget of administrative agencies. For example, the Detroit district office of the Commission, charged with the duty of administration and enforcement of the Act for approximately one-half of the State of Michigan, until recently was staffed with the District Supervisor and a secretary. Now, three additional safety inspectors have been added as part of the Commission's increased emphasis upon safety compliance. Needless to say, any enforcement program that will necessitate continuous examination of consular records and shipping records, if available, will impose great and excessive demands upon the limited time of Commission personnel.

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[18] See, Appendix A, *infra*, pp. 23-24.

These Appellants are genuinely alarmed at this prospect, for, although as previously noted, the large bulk of their traffic will still be fully regulated, they fear that no adequate enforcement program can be maintained to protect them and the public against unlawful competition that pays no heed to established rate structures, and that, for all practical purposes, international traffic between the United States and Canada will become subject to all those abuses that led to the enactment of the Motor Carrier Act in 1935.

This prospect is substantial and real. Many of Appellants have been in business since prior to 1935. While they have witnessed the stabilization in large measure of the motor carrier industry in the intervening years, they have also noted that the Commission with its limited staff has experienced some difficulty in gaining thorough enforcement on border city operations, as plainly demonstrated by the continuous operations of the two Appellees for several years *prior* to their filing the applications for authority out of which this matter arose.

Now, if enforcement is to be made even more difficult, if not practically impossible, then, the prospect is clear. There most assuredly will develop a deterioration in the motor carrier service available to American shippers of international traffic, not only as to traffic fitting the exemption as construed by the District Court, but all traffic moving via motor carrier between the United States and Canada and Mexico.

From the standpoint of the two Appellees, the Commission found, and as affirmed by the District Court, that there is no need for their service, as existing certificated carriers are well able to handle traffic presently available. The presence of Appellees' unnecessary service only cre-

ates those very evils which Congress expressly sought to eradicate.

The Commission has filed Notices of Appeal in each of these cases. These Appellants understand that such appeals may be dismissed upon request of the Commission. If this action is taken, some question will undoubtedly be raised as to the motivation underlying it. Any analysis of that motivation, without expression by the Commission itself, is pure speculation and surmise.

In any event, these Appellants have taken this appeal because they feel most strongly that the District Court erred as a matter of law in its construction of Section 203 (b)(8). Moreover, they are firmly convinced, based upon their actual experience during the past 33 years, that removal of certificate and tariff regulation from transportation of property between border cities, such as Detroit and Windsor, Port Huron, Michigan, and Sarnia, Ontario, Buffalo, New York, and Niagara Falls, Ontario, and other similar points handling heavy volumes of international trade, will have a truly devastating effect upon the stability of all motor carrier operations between the United States and Canada.

CONCLUSION

For these reasons, it is respectfully submitted that the Supreme Court of the United States, not the Federal District Court, should provide the final construction of Section 203 (b)(8). That final construction should be after plenary consideration of this cause by this Honorable Court.

Respectfully submitted,

REX EAMES,
Attorney for Appellants,
2606 Guardian Building,
Detroit 26, Michigan.

SULLIVAN, ELMER, EAMES & MOODY,
Of Counsel;

GEORGE H. CHOIACK,
Of Counsel,
705 Ford Building,
Detroit 26, Michigan.

APPENDIX A

OPINION OF FEDERAL DISTRICT COURT

This is a consolidated action brought by two motor carriers against the United States of America, pursuant to 28 U. S. C. A., Secs. 1336, 2321 (1950) et seq., and 49 U. S. C. A., Sec. 17(9) (1951) to void certain orders of the Interstate Commerce Commission and to restrain the Commission from interfering with the plaintiffs' business operations. The Interstate Commerce Commission and certain interested motor carriers were permitted to intervene as defendants, pursuant to 28 U. S. C. A., Sec. 2323 (1950). Since the two cases involve substantially similar facts they were consolidated and may be disposed of together.

The plaintiffs have operated as common carriers of property by motor vehicle between Detroit, Michigan, and Windsor, Ontario, since at least 1946. They have not received authorization from the Interstate Commerce Commission to conduct their operations.

In 1953 the Commission notified the plaintiffs that their Windsor-Detroit operations could not continue without authorization from the Commission. The plaintiffs formally applied for certificates of public convenience and necessity for their cartage operations in 1954. After hearings the Commission denied the applications. It is these orders which the plaintiffs seek to annul, taking the position that no certificates are necessary, and that their applications ought not to have been made for the reason that the statute expressly exempts th m from the requirement of obtaining certificates of public convenience and necessity.

At the outset it should be made clear that there is no evidence that the Commission acted arbitrarily or capriciously. The only substantial questions before this court are whether the claimed exemptions from the jurisdiction af the Interstate Commerce Commission, under Sections 202(c)(2) and 203(b)(8) of the 1935 additions to the Interstate Commerce Act, are available to the plaintiffs. The exemptions are only partial in any event since the Commission, as is not denied by the plaintiffs, retains certain jurisdiction as to qualifications, hours of service of employees, safety and standards of equipment.

As to the exemption provided by Section 202(c)(2), 49 U. S. C. A., Sec. 302(c)(2), (1951), set out in the margin,[1] the answer is a short one. The plaintiffs do not qualify for the exemption because they are not engaged in transportation for any common carrier by railroad, express company, motor carrier, water carrier or freight forwarder subject to other chapters of the Interstate Commerce Act.

The plaintiffs claim for exemption under Sec. 203(b)(8), 49 U. S. C. A., Sec. 303 (b)(8), (1951) presents a different problem. The relevant portion of the section provides as follows:

---

[1] "* * * the provisions of this chapter * * * shall not apply (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental." 49 U. S. C. A., Sec. 302(c)(2), (1951).

"Nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities * * *."

The exemption at issue here is that covering the transportation of property "between contiguous municipalities." It should be noted that there is no significant legislative history of the Motor Carrier Act of 1935 concerning this exemption. See 74th Cong., Sess. I (1935), H. Rept. No. 1645; Sen. Rept. No. 482 and 79th Cong. Rec. Part 5. pp. 5650. 5631; 74th Cong. Sess. I (1935).

That Windsor and Detroit are separate municipalities is not questioned but whether they are contiguous within the meaning of the exemption must now be decided. The two municipalities are directly opposite each other, separated by a river approximately one-half mile wide, and connected by a bridge, a vehicular and passenger tunnel and and a railway tunnel. The defendants concede that the plaintiffs' cartage between Windsor and Detroit is in foreign commerce. The plaintiffs' operations therefore fit within the clear language of the second exemption, namely, that the plaintiffs are engaged in the transportation of property in foreign commerce between contiguous municipalities.

The defendants urge, however, that in spite of the clear language of this exemption it should be construed to read: "between contiguous municipalities wholly within the United States." The defendants have made no showing that Congress did not intend to give the language used its ordinary and clear meaning. Indeed, even the Commission reads this section to exempt operations which cross state boundaries. See, *Chicago, Ill. Commercial Zone*, 1 M. C. C. 673 (1937); *St. Louis, Mo.—East St. Louis, Ill. Commercial Zone*, 1 M. C. C. 656 (1937); *Kansas City Mo.—Kansas City, Kansas, Commercial Zone*, 31 M. C. C. 5 (1941).

The meaning of a statute, clear and unambiguous on its face, may not be varied by administrative decisions. *Mid-Continent Petroleum Corp. v. N. L. R. B.*, 204 F. 2d 613 (C. A. 6th, 1953), cert. den. 346 U. S. 856 (1953); *I. C. C. v. Dunn*, 166 F. 2d 116 (C. A. 5th, 1948).

It may be noted that interpretations of this section by the Commission were in conflict during the crucial years when the Motor Carrier Act was first being implemented. In *Ed Goyeau Carrier Application*, 8 M. C. C. 359 (1938); 11 M. C. C. 519 (1938) and in *Eugene Ethier Contract Carrier Application*, 14 M. C. C. 785 (1939) the Commission held that Windsor and Detroit were contiguous and that operations between these cities were therefore within the exemption of Section 203 (b)(8). In 1940, however, the Commission apparently reversed its earlier position because it granted a certificate of public convenience and necessity to a carrier for Detroit-Windsor cartage. Certificate of Direct-Winters Transport, Ltd., No. MC 37918 SUB 1, Oct. 16, 1940. Then, in 1945, in *Resler, Extension of Operations—Juarez, Mexico*, 44 M. C. C. 733, the Commission formally ruled that Section 203 (b)(8) did not apply to a foreign municipality which

was contiguous to a city in the United States (El Paso, Texas). In *Ex Parte No. M. C. 37 Commercial Zones and Terminal Areas*, 46 M. C. C. 665, 686 (1946) the Commission overruled its ruling in the *Goyeau* and *Ethier* cases, holding that the exemption provided for in Section 203 (b)(8) did not apply to Detroit-Windsor carrier operations.

Said the Supreme Court in *United States v. Mo. Pac. R. R. Co.*, 278 U. S. 269, 280 (1932), commenting on administrative constructions of statutes:

> "• • • And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons." See, also *N. L. B. B. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C. A. 3d, 1952).

It seems clear, therefore, that this court ought not to attach such weight to the present interpretation by the Commission as to override its own judgment of the force of the statute.

We are also convinced that a literal interpretation of the section best complies with the intent and the policy of the statute. The exemption in question is clearly directed to relieving the Commission of the burdensome and highly expensive task of regulating purely local cartage operations. It is common knowledge that the United States borders at Mexico and Canada are dotted with "twin-cities," one of which is on each side of the border. No reason appears why the regulation of purely local cartage between such cities would be any less burdensome to the Commission, or more important to the economy of this country, than the regulation of cartage between Kansas City, Kansas and Kansas City, Missouri, or between New York City and Newark, New Jersey.

Indeed, in 1955 the Commission itself recognized that such border city operations were not important enough to be regulated by the Commission. In its Report to Congress for that year the Commission, acting under the assumption that Section 203(b)(8) did not exempt border city cartage operations, made this recommendation:

> "The present exemptions for local drayage do not apply to transportation from a city on the border of the United States to points in Canada or Mexico. Inasmuch as the Commission has found that no part of a foreign country is a part of a commercial zone which is exempt under section 203 (b)(8) of the act, it is necessary for all motor carriers performing local drayage between Detroit, Mich., and Windsor, Canada, or between El Paso, Tex., and Juarez, Mexico, and between other border points to obtain operating authority from the Commission. As a matter of practice, however, most of such local drayages have not obtained certificates, and the operations, particularly along the Mexican border, are being conducted in violation of the law. *This transportation does not seem to be of sufficient importance to the economy of the United States to justify the present requirement.*" (Emphasis added.) The 69th Annual Report to Congress by the Interstate Commerce Commission, p. 128 (1955).

Although this recommendation was not renewed in the 1957 report, the Commission does not claim that the economic importance of these operations has changed since 1955.

Nor are we persuaded that the exemption of border city cartage would create special problems of enforcement for the Commission. The defendant asserts that the Commission would be unable to discover whether the plaintiffs would operate in Canada beyond Windsor and therefore be outside the exemption for contiguous municipalities.

Assuming that the plaintiffs do extend their operations into Canada beyond Windsor, we fail to see how this should affect their exemption for operations between Detroit and Windsor. That the Commission is not concerned with purely Canadian operations is clearly demonstrated by the wording of the certificates given in the past to other Detroit-Windsor carriers. See, for example, the certificate of Charles Hinton and Company, Ltd., No. MC 864 23 (1949) "Between Detroit, Mich. and points and places within 8 miles of Detroit, on the one hand, and, on the other, the boundary of the United States and Canada at Detroit," and the Certificate of Detroit-Winters Transport, Ltd., No. MC 37918 SUB 1 (1940).

It also seems clear that as late as 1955 the Commission saw no great problems of enforcement or it would not have urged in its report that its jurisdiction over these operations be terminated. Here, also, the Commission does not claim that any new problems of enforcement have arisen since 1955.

Moreover, as a practical matter, if deemed necessary or important, the Commission can easily discover whether the plaintiffs have extended their operations. It can consult the records of the plaintiffs with respect to the shippers and consignees, and the consular invoices covering these shipments.

There is no merit in the claim of the Commission that the instant proceeding is a collateral attack on *Ex Parte No. MC-37 Commercial Zones and Terminal Areas*, 46 M. C. C. 665 (1946). This is an attack on the hearings to which these plaintiffs were parties. *Donald Gouin, Common Carrier Application, No. MC-114807; Peter Verbeem, Common Carrier Application, No. MC 114663.* The plaintiffs allege here that the Commission lacked jurisdic-

tion over the subject matter involved in these hearings. A judgment rendered without jurisdiction over the subject matter in question is void and a void judgment may be attacked directly or collaterally at any time. See, e.g., *Williams v. North Carolina,* 325 U. S. 226 (1945); *Rose v. Himely,* 4 Cranch. (U. S.) 241 (1808); 7 Moore's Federal Practice Par. 60.41 (1) (2d ed., 1954).

The statute exempts the plaintiffs in the operations here described from the requirement that they obtain certificates of public convenience and necessity. An appropriate form of order may be presented for signature.

THEODORE LEVIN,
United States District Judge.

I concur,
CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

I concur;
RALPH M. FREEMAN,
United States District Judge.

Dated: Detroit, Michigan,
August 2, 1957.

APPENDIX B-1

ORDER OF PERMANENT INJUNCTION IN VERBEEM CASE

The above captioned matter having regularly come on to be heard pursuant to 28 U. S. C. A., Section 1336, 2321 et seq., and 49 U. S. C. A., Sec. 17 (9) and a three-judge District Court having been instituted pursuant thereto, and a hearing having been held at which time the parties hereto offered certain evidentiary material and presented legal argument, and briefs in the matter having been filed by all parties hereto, and this Court, being fully apprised in the premises, having rendered an opinion of August 2, 1957, determining that the Interstate Commerce Commission is without jurisdiction to require plaintiff to seek and obtain certificates of public convenience and necessity, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, That the Interstate Commerce Commission, its officers, agents and employees, are hereby permanently restrained and enjoined from enforcing against plaintiff its order of October 18, 1955, and from requiring plaintiff to seek a Certificate of Public Convenience and Necessity in order to operate as a common motor carrier for hire in the transportation of property on shipments moving between Windsor, Ontario, Canada, on the one hand, and on the other, Detroit, Michigan and points in the Detroit, Michigan commercial zone, as defined by the Interstate Commerce Commission; PROVIDED, HOWEVER, that the origin and destination of such shipments shall be confined to Windsor, Ontario, Canada and Detroit, Michigan and points in the Detroit commercial zone, as defined by the Interstate Commerce Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That this Order shall in no way restrict the Interstate Commerce Commission from enforcing as to plaintiff the provisions of Section 204 of Part II of the Interstate Commerce Act (being 49 U. S. C. A., Sec. 304) relative to qualifications and maximum hours of service of employees and safety of operations and standards of equipment.

So ordered this 16th day of September, A. D., 1957.

CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

THEODORE LEVIN,
United States District Judge,

RALPH M. FREEMAN,
United States District Judge.

A true Copy:
By: C. James Chaffee,
Deputy Clerk.

APPENDIX B-2

ORDER OF PERMANENT INJUNCTION IN GOUIN CASE

The above captioned matter having regularly come on to be heard pursuant to 28 U. S. C.. A., Section 1336, 2321 et seq., and 49 U. S. C. A., Sec. 17 (9) and a three-judge District Court having been instituted pursuant thereto, and a hearing having been held at which time the parties hereto offered certain evidentiary material and presented legal argument, and briefs in the matter having been filed by all parties hereto, and this Court, being fully apprised in the premises, having rendered an opinion of August 2, 1957, determining that the Interstate Commerce Commission is without jurisdiction to require plaintiff to seek and obtain certificates of public convenience and necessity, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, That the Interstate Commerce Commission, its officers, agents and employees, are hereby permanently restrained and enjoined from enforcing against plaintiff its order of December 23, 1955, and from requiring plaintiff to seek a Certificate of Public Convenience and Necessity in order to operate as a common motor carrier for hire in the transportation of property on shipments moving between Windsor, Ontario, Canada, one the one hand, and on the other, Detroit, Michigan and points in the Detroit, Michigan commercial zone, as defined by the Interstate Commerce Commission; PROVIDED, HOWEVER, that the origin and destination of such shipments shall be confined to Windsor, Ontario, Canada and Detroit, Michigan and points in the Detroit commercial zone, as defined by the Interstate Commerce Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That this Order shall in no way restrict the Interstate Commerce Commission from enforcing as to plaintiff the provisions of Section 204 of Part II of the Interstate Commerce Act (being 49 U. S. C. A., Sec. 304) relative to qualifications and maximum hours of service of employees and safety of operations and standards of equipment.

So ordered this 16th day of September, A. D., 1957.

CHARLES C. SIMONS,
Chief Judge, United States Court of Appeals,

THEODORE LEVIN,
United States District Judge,

RALPH M. FREEMAN.
United States District Judge.

A true Copy:
By: C. James Chaffee,
Deputy Clerk.

APPENDIX C-1

REPORT OF THE COMMISSION, DIVISION 1, IN VERBEEM CASE

Division 1, Commissioners Mitchell, Tuggle and Hutchinson by Division 1:

Exceptions were filed by applicant to the order recommended by the joint board, and protestants and interveners replied.

By application filed April 1, 1954, Peter Verbeem, of Windsor, Ontario, Canada, doing business as Peters Cartage Service, seeks a certificate of public convenience and necessity authorizing operation, in foreign commerce, as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in the Detroit, Mich., commercial zone, on the one hand, and, on the other, the United States-Canadian International boundary line at ports of entry at or near Detroit, over irregular routes. Numerous motor carriers oppose the application.

The board recommended denial of the application. In his exceptions, applicant contends, that his past operations conducted under a color of right together with the testimony of the supporting shippers establishes a need for the proposed service, and that a grant of the requested authority will not adversely affect presently authorized carriers. These contentions are in turn denied by replicants which urge that the application be denied.

We have given full consideration to the evidence, and to the exceptions and replies thereto, and find that the board's report reflects the facts of record. Like the

board, we conclude that the testimony of the five supporting shippers and the past operations of applicant fall far short of establishing a need for the proposed service. One shipper has used applicant's service since 1946 and three others since 1952. The fifth utilized applicant's service from 1946 to 1950. Collectively, their present utilization of applicant's service is for the transportation of from 85 to 150 shipments a year. They have made little, if any, use of the services of the, at least, 15 existing motor carriers now authorized to operate within the area proposed to be served by applicant. There is no basis in this record for concluding that existing authorized services are inadequate. The past operations of applicant for the supporting shippers and others upon which applicant strongly relies, are insufficient, of themselves, to warwant a grant of the sought authority.

We find that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 1, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 18th DAY OF OCTOBER, A. D. 1955.

No. MC-114663

Peter Verbeem Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX C-2

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 26th DAY OF MARCH, A. D. 1956.

No. MC-114663

Peter Verbeem Common Carrier Application

(Windsor, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition dated November 29, 1955 by applicant for reconsideration;
2. Joint reply of Consolidated Truck Lines, Ltd., Direct-Winters Transport, Ltd., and Inter-City Truck Lines, Ltd., protestants, dated December 16, 1955;
3. Joint reply by Creasey Cartage, Ltd., et al., interveners, dated December 20, 1955;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reason that the evidence adequately supports the findings of Division 1 herein.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX C-3

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 28th DAY OF AUGUST, A. D. 1956.

No. MC-114663

Peter Verbeem Common Carrier Application

(Windsor, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant for reopening, reconsideration, and further hearing, dated May 16, 1956;

(2) Joint reply of Consolidated Truck Lines, Ltd., DirectWinters Transport, Ltd., and Inter-City Truck Lines, Ltd., protestants, dated June 1, 1956;

(3) Joint petition of Amlin Cartage and 11 other interveners, dated June 4, 1956;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reasons that (1) the findings of Division 1 are adequately supported by the evidence, (2) applicant has been afforded ample opportunity to be heard and further hearing is not shown to be warranted, and (3) no sufficient cause appears for granting reopening, reconsideration, or the setting aside of the Commission's order of March 26, 1956.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-1

REPORT OF THE COMMISSION, DIVISION 1, IN GOUIN CASE

DIVISION 1, COMMISSIONERS MITCHELL, TUGGLE, AND HUTCHINSON BY DIVISION 1:

Exceptions to the order recommended by the joint board were filed by applicant and certain protestants and interveners in opposition to the application. Protestants and interveners in opposition replied to applicant's exceptions. Our conclusions differ from those recommended.

By application filed June 21, 1954, Donald Gouin, doing business as Don's Transports & Cartage, of Tecumseh, Ontario, Canada, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, between Detroit, Mich., and points in the Detroit, Mich., commercial zone, on the one hand, and, on the other, the United States-Canadian international boundary at or near Detroit, over irregular routes. Numerous motor carriers oppose the granting of the application.

The board recommended that applicant be granted authority to operate as a common carrier by motor vehicle, of roofing and roofing materials, from Detroit, Mich., to the United States-Canadian international boundary at or near Detroit, over irregular routes. On exceptions, ap-

plicant contends that evidence of past operations conducted by him under "color of right" together with shipper's testimony, establishes that there is need for the continuance of his service in the transportation of general commodities between the described points. In their exceptions and replies to those of applicant, protestants and interveners contend that any past operations by applicant under a claimed color of right merit no consideration in view of applicant's failure to file promptly an application for appropriate authority when notified that such was necessary; and that the evidence submitted in this proceeding completely fails to show a need for the proposed service which cannot be met by existing carriers.

Consideration has been given to the evidence, and to the exceptions and replies thereto, and we find the board's statement of facts to be correct and adequate with the following additions, and as thereby supplemented, such statement is adopted as our own. We are unable, however, to agree with the conclusions reached by the board.

Applicant, since early in 1946, has been transporting various commodities, principally whiskey, building and roofing materials, and automobile parts, between Detroit and the international boundary between that point and Windsor, Ontario Canada. These operations were unauthorized, and in April 1952, applicant was informed by letter from a representative of this Commission that appropriate authority was required. Approximately 15 months thereafter applicant engaged an attorney but failed to provide him with necessary data for the filing of an application; thereafter he engaged another attorney and filed the instant application on June 21, 1954. Applicant's record of past shipments shows that for the past several years his operation has consisted predominately of the transportation of roofing materials and automobile

parts from Detroit to Windsor. One tractor-trailer unit has been used in the operation.

The supporting shipper of roofing materials has used applicant's service from Detroit to Windsor in the transportation of 10 to 15 shipments of roofing materials in 1952; 15 to 20 shipments in 1953; and 20 to 25 shipments in 1954. It requires prompt service and is satisfied with that rendered by applicant; however, it has made no investigation as to the number of presently authorized carriers and has not tendered them any of the traffic. It was stipulated between the parties that another shipper of roofing materials does business with applicant in a similar manner. Fifteen motor carriers having authority to operate between the points involved offered evidence, directly or by stipulation, as to their willingness and ability to meet the transportation requirements of the described shippers.

The burden of proof is upon applicant to establish that the proposed service is required by the public convenience and necessity, and his past operations for the supporting shippers and others, standing alone, are insufficient to warrant a grant of authority. Clearly, there is an abundance of motor service available in the area, and there is no showing on this record that such service is inadequate in any respect. Under the circumstances, we conclude that the application should be denied.

We find that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 1, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 23rd DAY OF DECEMBER, A. D. 1955.

No. MC-114807

Donald Gouin Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its finding of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby denied.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-2

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 3rd DAY OF MAY, A. D. 1956.

No. MC-114807

Donald Gouin Common Carrier Application

(Tecumseh, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant for reconsideration and further hearing, dated March 1, 1956;

(2) Joint reply of Consolidated Truck Lines Limited, Direct-Winters Transport, Ltd., and Inter-City Truck-Lines Limited, protestants, dated March 19, 1956;

(3) Joint reply of E. W. Lancaster Co., Ltd., Creasey Cartage Ltd., International Cartage, Ltd., Maroon Cartage, Morrice Cartage, Overland Express, Ltd., Amlin Cartage, Bondy Cartage, Parent Cartage and McCourt Cartage, protestants, and Windsor Truck & Storage and C. Hinton Company, Ltd., interveners in opposition, dated March 19, 1956;

and good cause appearing therefore;

It is ordered, That said petition be, and it is hereby, denied, for the reasons that (1) the evidence adequately supports the findings of Division 1, and (2) further hearing is not warranted.

By the Commission.

HAROLD D. McCOY,
Secretary.

(Seal)

APPENDIX D-3

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 24th DAY OF AUGUST, A. D. 1956.

No. MC-114807

Donald Gouin Common Carrier Application

(Tecumseh, Ontario, Canada)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Applicant's petition for "stay of effective date, reopening and reconsideration of order of the Interstate Commerce Commission dated May 3, 1956, and/or for dismissal of application", dated June 15, 1956.

(2) Joint reply of Consolidated Truck Lines Limited, Direct-Winters Transport, Ltd., and Inter-City Truck Lines Limited, protestants, dated July 3, 1956.

(3) Joint reply of E. W. Lancaster Co., Ltd., Creasey Cartage Ltd., International Cartage, Ltd., Maroon Cartage, Morrice Cartage, Overland Express, Ltd., Amlin Cartage, Bondy Cartage, Parent Cartage and McCourt Cartage, protestants, and Windsor Truck & Storage and C. Hinton Company, Ltd., interveners in opposition, dated July 6, 1956.

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby denied, for the reasons that (1) the findings of Division 1 are adequately supported by the evidence, and (2) that no sufficient cause appears for granting reopening, reconsideration or the setting aside of the order of May 3, 1956.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX E

Portion of Commission's Decision in Ex Parte No. MC-37

"Despite the implication in the cases above discussed that operations between Detroit and Windsor might be found to be within the exemption provided by section 203 (b)(8), and the consequent withholding of the requested operating authorities because it had not been shown that such operations were not within the exemption, we are now convinced that the conditional and partial exemption, provided by section 203 (b)(8) applies only to local operations performed wholly within the United States. The reference in the statute to "transportation * * * wholly within a municipality" unquestionably refers only to municipalities in the United States. By the same token we think the reference to "contiguous municipalities" and to the "zone adjacent to and commercially a part of such municipality or municipalities" should be read as referring only to contiguous municipalities and commercial zones within the United States. This was the result reached in Resler Extension of operations—Juarez, Mex. 44 M. C. C. 733, decided subsequent to the cases cited above. From the foregoing it follows that the commercial zone, contemplated by section 203 (b)(8), adjacent to any municipality located at or near an international boundary, consists of the same areas as would be included were the municipality in question otherwise located, except that all municipalities, contiguous or otherwise, and all unincorporated areas, not within the United States, must be excluded."

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FILED
MAY 12 1958
JOHN T. FEY, Clerk

No. 881

In the

Supreme Court of the United States

OCTOBER TERM, 1957

NOS. —— AND ——

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

PETER VERBEEM, doing business as PETERS CARTAGE, APPELLEE

WILLIAM AMLIN and DARRELL AMLIN, d/b/a AMLIN CARTAGE, H. BONDY, d/b/a BONDY CARTAGE, EDMUND GOYEAU, LEO GOYEAU and OSCAR GOYEAU, d/b/a ED. GOYEAU & SONS, CHARLES HINTON & CO., LTD., HUSBAND INTERNATIONAL TRANSPORT, LTD., THE E. W. LANCASTER CO., LTD., McCOURT CARTAGE, WILLIAM HAROLD MORRICE, d/b/a MORRICE CARTAGE COMPANY, OVERLAND EXPRESS, LTD., PARENT CARTAGE, LTD., THE WINDSOR TRUCK AND STORAGE CO., LTD., DIRECT-WINTERS TRANSPORT, LTD., INTER-CITY TRUCK LINES, LTD. and CONSOLIDATED TRUCK LINES, LTD., APPELLANTS,

v.

DONALD GOUIN, doing business as DON'S TRANSPORTS AND CARTAGE, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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In the

Supreme Court of the United States

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Appellees have filed a Motion to Affirm the decision of the District Court in the subject causes upon the ground that the question on which the decision of the causes depends is so unsubstantial as to need no further argument. This contention of unsubstantialness appears to be grounded in the two following arguments:

(1) That the volume of motor carrier operations here involved is "insignificant"; and

(2) That the Appellants' position with regard to its proposed construction of Section 203(b)(8) is clearly without any merit.

Appellants will direct themselves to the two foregoing arguments in this Brief.

ARGUMENT

Appellees argue that the extent of the transportation operations involved in these causes is so "insignificant" that this Court should not grant plenary consideration. Appellees' Motion to Affirm does not set forth any evidence in support of this argument of "insignificance", and, undoubtedly, this absence of evidence is due to the fact that there was no need to develop such evidence in the proceedings before the Commission and the District Court.

Nevertheless, there are certain positive indications in the record that do indicate that the motor carrier operations here in question are substantial in nature and quantity. In the first place, the Lower Court itself noted that, "It is common knowledge that the United States borders at Mexico and Canada are dotted with 'twin-cities',

one of which is on each side of the border."[1] Reference to a map demonstrates beyond question that the United States has several thousands of miles of common boundaries with Canada and Mexico. Along those thousands of miles of common boundaries, there is literally a multitude of such twin-cities, and the instant appeals directly affect motor carrier operations at each of those points.

Secondly, it is informative to note that the evidence in the instant causes affirmatively establishes that there is a large number of motor carriers engaged in transporting the subject traffic in foreign commerce at just *one* of the gateways, namely, Detroit-Windsor. In addition to the fourteen Intervening Defendants performing such motor carrier services, there are several others, as pointed out in Appellees' Brief on page 4.

If the subject motor carrier operations are so "insignificant" as urged by Appellees, there is cause to wonder why there is such a large number of carriers actually engaged in handling such traffic.

It is, also, significant to note that the World Almanac, 1958, p. 670, discloses that there was in excess of 7 billion dollars of trade between the United States and Canada in 1956 and in excess of 1 billion dollars in trade between the United States and Mexico in 1956. While all of this trade did not move via motor carrier and, obviously, involved points of origin and destination far beyond the so-called twin-cities, nevertheless, such statistics affirmatively reflect the tremendous volume of trade moving between such countries. Having in mind the large number of industrial municipalities which are adjacent to one another along the boundaries of the said countries, it is more

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[1] Appendix A, Jurisdictional Statement, p. 27.

than apparent that we are here dealing with foreign commerce of substantial quantity and importance.

The second argument of Appellees in support of their Motion to Affirm is that Section 203(b)(8) is so "clear and unambiguous" on its face that there is no need for this Court to give any deeper consideration to the proper construction of this section. Appellees seem to argue that the unqualified use of the word "municipalities" in Section 203(b)(8) precludes any construction of that word short of all "municipalities" in the world. From this premise, they argue that the Appellants would urge this Court to insert limiting language such as "within the United States" immediately following the word "municipalities" as found in the subject section.

What constitutes a clear and unambiguous expression is oftentimes the subject of reasonable dispute itself. Appellants would first point out that no language in Section 203(b)(8) precludes a construction of that section limiting its effect to municipalities located in the United States. In other words, the construction urged by Appellants is not inconsistent with or opposed by any language appearing in said section.

Secondly, the prior decisions of this Court do not support Appellees' insistence that the broadest possible construction of statutory language is the *only* possible construction. In *U. S. v. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345, (1940), this Court was required to construe Section 204(a) of the Interstate Commerce Act which provided that it shall be the duty of the Commission to regulate common, contract and private carriers with respect to the "qualifications and maximum hours of service of employees * * *" of such carriers. The Interstate Commerce Commission had construed Section 204(a) so as to limit its jurisdiction to prescribing

qualifications and maximum hours of service *only for employees whose duties are related to safety of operations.* Certain motor carrier associations petitioned a three-judge District Court to compel the Commission to take jurisdiction and consider the establishment of qualifications and hours of service of *all* employees of such carriers. The District Court reversed the Commission in its construction of Section 204(a), and, upon appeal to this Court, the District Court was reversed and the original decision of the Commission affirmed. In doing so, this Court stated:

> "There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation" (at p. 541).

This Court reviewed Section 204(a) in light of the Congressional intent and placed upon the word "employees" a more limited meaning than might otherwise be reached from mere rules of grammar. In short, the most broad construction of statutory language is not a strait jacket upon the judiciary in the performance of its duty in ascertaining Congressional intent.

In *United States v. Cooper Corporation*, 312 U. S. 600, 85 L. Ed. 1071, (1941), this Court was confronted with the question as to whether Section 7 of the Sherman Act permitted the United States to maintain an action for treble damages. Section 7 provided that such action could be maintained by "any person who shall be injured in his business or property". This Court recognized that the United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in

vindication of its property rights. In concluding that Section 7 was not intended to apply to the United States, this Court stated as follows:

> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction" (at p. 605).

This limiting construction of Section 7 was predicated upon two bases:

(1) The general rule that legislation does not have application to the sovereignty, unless clearly indicated; and

(2) The assumption that the term "person" was employed by the Congress throughout the Sherman Anti-Trust Act in the same, and not in different, senses.

Both of these bases are directly applicable in the instant case. Just as there is a presumption excepting the sovereignty from application of legislation, there is a presumption that the Congress intends only to deal with land and acts committed within the United States. See, *Sandberg v. McDonald*, 248 U. S. 185.

Secondly, in *United States v. Cooper, supra*, this Court, in reaching the proper construction of Section 7, looked to other sections of the Sherman Act and there found that the term "person" clearly could not apply to the United States. Thus, this Court reasoned that the term "person" should be construed consistently throughout the Act.

In the case at bar, Section 203(b)(8) of the Interstate Commerce Act provides the limited exemption as to transportation in interstate or foreign commerce,

> "wholly within a municipality or between contiguous municipalities or within a zone adjacent and commercially a part of any such municipality or municipalities * * *."

There can be no question but that the exemption as it relates to transportation "wholly within a municipality" has reference *only* to municipalities in the United States. However, Appellees would urge that this very same term in the immediately succeeding phrase in the same sentence was intended by Congress to mean something different, i. e., municipalities in foreign countries when contiguous to United States municipalities. This Court, in *United States v. Cooper Corporation, supra,* ruled that:

> "It is fair to assume that the term 'person', in the absence of an indication to the contrary, was employed by the Congress throughout the act in the same, and not in different, senses" (at p. 607).

Similarly, it is fair to assume that the term "municipality" was employed by Congress throughout Section 203(b)(8) of the Act in the same, and not in different, senses. There is not the slightest indication that Congress desired to have different and conflicting meanings attached to this term.

The two cases cited above clearly demonstrate the serious error of the Appellees' arguments in the case at bar. Just as the terms "employees" in Section 204(a) of the Interstate Commerce Act and "persons" in Section 7 of the Sherman Act were found by this Court to have been used in a restricted sense by Congress, so the term "municipalities" as used in Section 203(b)(8) of the Interstate

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IN THE

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Appellants,
vs.
PETER VERBEEM, doing business as PETERS CARTAGE,
Appellee

WILLIAM AMLIN and DARRELL AMLIN, doing business as AMLIN CARTAGE, et al.,
Appellants,
vs.
DONALD GOUIN, doing business as DON'S TRANSPORTS AND CARTAGE,
Appellee

MOTION TO AFFIRM

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Appellee

MOTION TO AFFIRM

Appellees, PETER VERBEEM, doing business as PETERS CARTAGE, and DONALD GOUIN, doing business as DON'S TRANSPORTS & CARTAGE, by their counsel and pursuant to Rule 16 (1)(c) of the Revised Rules of the Supreme Court of the United States move that the Opinions and Orders of Permanent Injunction of the District Court in the causes from which this appeal is taken be affirmed.

These are direct appeals from the final opinions and Orders of Permanent Injunction entered pursuant thereto on September 16, 1957, by a specially-constituted District Court of three (3) judges convened pursuant to Sections 2284 and 2325, Title 28 United States Code. Appellants, William Amlin and Darrell Amlin, doing business as Amlin Cartage and others who were intervening defendants below filed Notice of Appeal on November 14, 1957 and their Jurisdictional Statement on March 28, 1958. Appellant, Interstate Commerce Commission, also filed Notice of Appeal on November 14, 1957 but has not filed a Jurisdictional Statement and has now submitted a Stipulation as to dismissal of its appeal.

Appellees submit that the opinions of the District Court and the Orders of Permanent Injunction should be affirmed for the reason that the question on which the decision of the causes depend is so unsubstantial as to need no further argument.

BACKGROUND AND NATURE OF THE PROCEEDINGS

Appellees, Peter Verbeem, doing business as Peters Cartage and Donald Gouin, doing business as Don's Transports & Cartage, herein commenced transporting property between Windsor, Ontario, Canada, and Detroit, Michigan and vicinity as common carriers by motor vehicle in the fall of 1945 and in February 1946, respectively, at a time when it appeared that the Interstate Commerce Commission took the position that no authority was required from it to conduct such operations.[1] Approximately one year after the

[1] *Goyeau Contract Carrier Application*, 8 MCC 359; *Goyeau Common Carrier Application*, 11 MCC 519; *Ethier Contract Carrier Application*, 14 MCC 785, and *Hinton Common Carrier Application*, 28 MCC 81.

appellees had commenced operating, the Interstate Commerce Commission appeared to reverse its former position and hold that operations in the transportation of property as a carrier for hire between Windsor, Ontario, Canada, and Detroit, Michigan required authority.[2] This was not brought to the attention of appellees until several years later when they were advised by a local representative of the Interstate Commerce Commission that they would have to obtain authority from the Commission to continue conducting their operations.

Appellees, accordingly, filed their applications for authority and advised the Interstate Commerce Commission that pending determination of their respective applications they intended to continue their operations on the theory that under Section 9 (b) of the Administrative Procedure Act [Title 5, United States Code Sec. 1008 (b)] they were entitled to continue their operations until there had been a final determination by the Interstate Commerce Commission of their respective applications. The validity of such position was, in effect, recognized by the Commission in its decision in *John E. Merrifield, Common Carrier Application*, 61 M. C. C. 103.

The Jurisdictional Statement of appellants sets forth in detail the proceedings before the Interstate Commerce Commission, pages 4-6. Accordingly, this will not be repeated herein. It should be pointed out, however, that although the applications of appellees sought authority to operate between the port of entry on the international boundary between the United States and Canada, at or near Detroit, Michigan and Detroit, Michigan and points in the Detroit Commercial Zone, and there are a number of

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[2] *Ex Parte MC-37, Commercial Zones and Terminal Areas*, 46 MCC 665 at 689.

United States domiciled carriers, which have authority to perform such operations, none of such United States carriers opposed appellees' application or intervened in these proceedings. The only carriers protesting appellees' applications before the Commission were Canadian domiciled carriers, several of whom received their authority some time after appellees had started operating.

After the application of each appellee had been denied and all administrative remedies in connection therewith exhausted, appellees filed their respective appeals from the orders of the Interstate Commerce Commission denying their applications. The appeals were filed on the grounds that:

1. The Commission had no jurisdiction to regulate operations of motor carriers for hire in the transportation of property between Detroit, Michigan and Windsor, Ontario, Canada and those points in an area about Detroit, known as the Detroit, Michigan Commercial Zone.[3]

2. Even if the Commission had jurisdiction over such operations, its orders denying the applications of appellees were void for the reason that they were arbitrary, capricious and unreasonable.

After a full hearing on the issues, the Three Judge Federal District Court convened in this matter, on August 2, 1957, rendered its decision in an opinion reproduced in full in appellants' Jurisdictional Statement at pages 20-30. The Court held that the statute exempts the operations of appellees from the requirements that they obtain certificates of convenience and necessity and thereafter entered orders of Permanent Injunction. Subsequently, notices of

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[3] Defined in *Ex Parte MC-37, Commercial Zones and Terminal Areas*, Title 49, Part 170, Sec. 170.23, Code of Federal Regulations.

appeal to the Supreme Court of the United States were filed by intervening defendants in this matter, all of whom are residents of Canada, and also by the Interstate Commerce Commission. A Jurisdictional Statement has been filed by the intervening defendants. The Interstate Commerce Commission has submitted to counsel for appellees and appellants a Stipulation as to Dismissal of Appeals by the Interstate Commerce Commission to the Supreme Court, stating that the Interstate Commerce Commission voluntarily desires to dismiss the appeals filed by it. The only appeals docketed in your Court, therefore, are those of intervening defendants.

ARGUMENT

I.

QUESTION ON WHICH DECISION DEPENDS IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT

It is submitted that the Opinions of the District Court and the Orders of Permanent Injunction should be affirmed inasmuch as the question on which the decision of the causes herein depends is so unsubstantial as to need no further argument. The Interstate Commerce Commission, the principal defendant below, by its decision not to prosecute its appeal appears to have, in effect, conceded that this is so.

The question for consideration here is whether under Section 203(b)(8) of the Interstate Commerce Act (Sec. 303 (b)(8), Title 49 United States Code) certain motor carrier for hire operations between contiguous municipalities and in so-called commercial zones are exempt where part of the operation is conducted in Canada or Mexico.

The District Court held that they are exempt. The decision of the District Courts and the early decisions of the Commission are in accordance with the plain and unambiguous language of the statute. The interpretation contended for by appellants herein is illogical, contrary to the express language of the statute, and requires reading into the section of the statute involved language which Congress did not see fit to include therein as will be hereinafter shown.

The extent of the transportation operations involved here is so insignificant when considered in comparison with the extent of the interstate and foreign commerce operations which it must be conceded are exempt under Section 203(b) from all but certain provisions of the Interstate Commerce Act relating to employees of carriers and the safety of their operations that it can only be concluded, it is submitted, Congress clearly did not intend to exclude the transportation here involved from the exemption provisions of Section 203 (b)(8).

For the foregoing reasons, which will be more fully developed hereafter, appellees submit the question on which the decision of the causes herein depends is so unsubstantial as to need no further argument and the Opinions and Orders of Permanent Injunction of the District Court should be affirmed.

1. The Construction of Section 203(b)(8) by the District Court Is Reasonable and in Accord with the Intent of Congress as Expressed in the Plain Language of the Statute.

The interpretation placed upon Section 203 (b)(8) of the Interstate Commerce Act by the District Court, which was apparently the interpretation placed upon the Section by the Interstate Commerce Commission for the first 11 years of its regulation of motor carriers for hire is fully in accord with the clear and unambiguous language of the section.

The section, in effect, provides that the transportation of property in interstate or foreign commerce, wholly within a municipality, between contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or municipalities shall be exempt from all but the qualifications and maximum hours of service of employees and safety of operations provisions of Section 204 of the Act. It is the position of appellants herein that where transportation between contiguous municipalities involves transportation between two cities, one of which is in the United States and the other in Canada or Mexico, or where transportation within a zone adjacent to and commercially a part of a municipality is partially in the United States and partially within Canada or Mexico, such transportation cannot be considered exempt under Section 203(b)(8) because it involves operations into a foreign country.

The operations or transportation involved in these causes is transportation between Detroit, Michigan and Windsor, Ontario, Canada. Appellants concede that as a matter of fact Detroit and Windsor are contiguous municipalities. The District Court so concluded and the Interstate Commerce Commission so found in its decision in *Ex Parte MC-37, Commercial Zones and Terminal Areas*, 46 M. C. C. 665, 681-2. In the same proceedings at page 686, the Interstate Commerce Commission also indicated that as a practical matter the Commercial Zone of Detroit, Michigan lies, in part, in the adjacent foreign country, Canada, and would obviously, therefore, include the contiguous municipality of Windsor. Even appellants here in their Jurisdictional Statement concede the existence of an "interacting commercial influence" between Windsor and Detroit.

Appellants' position here is obviously based upon the claim that Congress could not have intended the language of the section involved to extend to transportation into a

foreign country. It is difficult to conceive, however, how Congress could have made it clearer that Section 203(b)(8) covered such transportation. It is expressly stated that the provisions of the Interstate Commerce Act, except those relating to qualifications and maximum hours of service of employees and safety of operations, shall not apply to the "transportation of * * * property in interstate or *foreign* commerce * * * between contiguous municipalities, or within a zone adjacent to and commercially a part of such municipality or municipalities." Foreign commerce is defined in Section 203(a)(1) of the Act (Sec. 303 (a)(11), Title 49 United States Code) as including commerce between any place in the United States and any place in a foreign country. By referring to foreign commerce in Section 203(b)(8) it is clear, therefore, that Congress intended to extend the exemption to transportation such as that herein involved. It is obvious that had Congress intended to limit the exemption to operations between contiguous municipalities or commercial zones wholly within the United States it could easily have done so by inserting the phrase "within the United States" at appropriate places so that the section would apply to the "transportation of * * * property in interstate or foreign commerce * * * between contiguous municipalities *within the United States or* within a zone *within the United States* adjacent to and commercially a part of such municipality or municipalities." (Words italicized added). To hold otherwise than that the transportation of property between Detroit and Windsor is within the exemption of Section 203(b)(8) is to disregard the plain and unequivocal language of the statute and to read into the statute language Congress did not see fit to include therein. It is axiomatic that courts and administrative tribunals are not free to construct or interpret language which is clear and unambiguous; and that where the intention of Congress can be ascertained from the language of the statute, there is no

justification for giving such language any different meaning, and certainly not by reading into the statute language which Congress did not include therein. For the Court to do so would be legislating, which is clearly beyond its power.[4]

2. Construction Placed Upon Section 203(b)(8) by the District Court Is the Only Logical and Consistent Construction.

The construction placed upon Section 203(b)(8) by the District Court is the only logical and consistent construction of such section. Not only does the construction advanced by appellants require, as has been heretofore pointed out, that language be read into the section, but it also requires the taking of an inconsistent position, to-wit, that Congress intended to consider operations in foreign commerce in determining what is to be regulated, but not with respect to what is to be exempt from regulation. The term "municipality" as used in the statute is clear and requires no interpretation. If the appellants' contention that under the section involved we can look only to municipalities in the United States is correct, then the transportation involved would still be exempt since the only operations which could be considered would be within the United States. In other words, appellants contend that we cannot look beyond Detroit since Windsor is in a foreign country. If the considered section is so interpreted, then the only operations which could be considered would be those conducted in Detroit, a municipality; and it would follow, therefore, that they are exempt since the considered operations would be wholly within a municipality within the

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[4] *Interstate Commerce Commission v. Dunn*, (C. C. A. 5th, 1948) 166 F. 2d 116.

United States. To adopt appellants' interpretation is to read language into the section for certain purposes and omit it for others. This clearly is not consistent. The only logical and consistent interpretion is the one adopted by the District Court.

As has been previously pointed out, Detroit and Windsor are admittedly contiguous municipalities. It must be conceded that under the clear language of Section 203(b)(8), transportation of property in foreign commerce wholly within Detroit is exempt. It must further be conceded that transportation of property in Windsor is beyond the power of Congress or the Interstate Commerce Commission to regulate. The effect of the construction advanced by appellants is to say that while a carrier may without authority engage in the transportation of property in Detroit to the very border of Windsor in foreign commerce, once the border is crossed and property transported into a foreign city authority is required even though no jurisdiction can be exercised over the operation in the foreign city. This is an anomalous position indeed and one requiring considerable mental gymnastics. Indeed, the Interstate Commerce Commission itself recognized the illogic of such position in *Ex Parte MC-37, Commercial Zones and Terminal Areas,* 46 MCC 665, 687.

3. Construction of Section 203 (b) (8) Adopted by the District Court Clearly Intended by Congress.

It seems evident that the construction of Section 203 (b)(8) adopted by the District Court in the causes involved herein is clearly in accord with the intent of Congress in enacting such section. When the Motor Carrier Act of 1935 [Title 49 U. S. C. Sec. 301 *et seq.*] was enacted in August

of 1935, Section 203 (b)(8) was worded as it is now worded. As has been previously pointed out, the language of such section is clear and unambiguous. In the years just following its enactment, the Interstate Commerce Commission, while the Motor Carrier Act (now Part II, Interstate Commerce Act) was still new and when the Commission must have been fully conscious of the legislative purposes for adopting the Act, in various decisions held that the transportation of property between Detroit and Windsor did not require authority from the Commission as it was exempt under Section 203 (b)(8).[5] In 1938 and 1940 the Motor Carrier Act was amended and yet Congress did not in the light of the Commission's interpretation thereof see fit to change the language of Section 203 (b)(8) or in any way to indicate that it did not intend to exempt operations such as those here involved.

A consideration of the extent of the other transportation in interstate or foreign commerce exempted by Congress under Section 203 (b) and particularly subsection (8) thereof from the jurisdiction of the Interstate Commerce Commission, except as to such matters as hours of service of employees and safety operations, would compel the conclusion that Congress intended to exempt the transportation here involved even if there had been any ambiguity in the language in question. Since there is no ambiguity, there can be no escape from the conclusion that Congress intended to exempt the operations in question.

Congress in adopting the Motor Carrier Act provided for the exemption of many transportation of property operations in interstate or foreign commerce from the requirement that authority must be obtained from the Interstate Commerce Commission to perform such operations.

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[5] Cases cited in footnote 1 *supra*.

By the terms of Section 203 (b) much more extensive transportation operations are exempted than those involved herein. For example, the transportation of ordinary livestock, fish, and agricultural commodities (not including manufactured products thereof) is exempt from the provisions of the Interstate Commerce Act, except those pertaining to such things as hours of service of employees and safety of operations. These classes of property may be transported anywhere in the United States in interstate or foreign commerce under such exemption. The term "agricultural commodities (not including manufactured products thereof)" has been construed to include a broad range of commodities, including frozen fruits and vegetables.[6] It might be well to point out here that the Interstate Commerce Commission has not hesitated to hold that the transportation of fresh fruits and vegetables between points in the United States and points in Mexico are exempt under the so-called "agricultural commodities" exemption of Section 203(b)(6) [Title 40, Sec. 303 (b)(6)][7] even though subsection (6) of Section 203(b) does not specifically refer to transportation in foreign commerce, while at the same time it held that operations between points in the United States and points in Mexico could not be considered exempt under subsection (8) of Section 203 (b) although such subsection specifically exempts transportation in foreign commerce.[8] There is nothing in the language of the statute justifying such conflicting interpretation.

In addition to exempting the transportation of livestock, fish, and agricultural commodities, Section 203 (b) exempts

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[6] *Frozen Food Express v. U. S.* (D. Ct. Tex. 1956), 148 F. Supp. 399, aff'd per curiam U. S. Sup. Ct., Oct. 14, 1957.

[7] *Auto Transporters Del Norte, Common Carrier Application*, 48 MCC 671, 673.

[8] *Ex Parte MC-37, Commercial Zones and Terminal Areas, infra.*

transportation performed by farmers and that performed by certain cooperative associations and the transportation of newspapers. Such transportation is exempt even though, for example, performed between a point in New Jersey and a point in California. Even more significant than this, however, is the fact that Section 203 (b)(8) itself unquestionably exempts transportation of property in interstate or foreign commerce where:

1. The transportation is wholly within a municipality. Thus, for example, all interstate or foreign commerce operations wholly within a city such as Detroit, Michigan, Chicago, Illinois or New York, New York are exempt.

2. The transportation is performed between contiguous municipalities where both are located in the United States. Thus, operations between Kansas City, Kansas and Kansas City, Missouri; St. Paul and Minneapolis, Minnesota; Rock Island, Illinois and Davenport, Iowa are exempt.

3. The transportation is within a zone adjacent to and commercially a part of a municipality or municipalities, commonly known as a commercial zone, when all of such zone is within the United States. Thus, transportation in the Chicago, Illinois Commercial Zone, which includes municipalities in Indiana as well as in Illinois, or in the Cincinnati, Ohio Commercial Zone, which includes municipalities in Ohio and Kentucky, is exempt.[9]

It is difficult to conceive that Congress would exempt all of the above operations and not those here involved. This

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[9] Defined in *Ex Parte MC-37, Commercial Zones and Terminal Areas, infra* note 3.

is especially so when consideration is given to the magnitude and scope of the operations it must be conceded were exempted when contrasted with the insignficance of the operations here involved. Indeed, the Interstate Commerce Commission itself in its 69th Annual Report to the Congress made in 1955, stated that transportation between border cities such as Detroit and Windsor is of little, if any, importance to the United States.[10] The Commission's decision not to prosecute its appeal is further evidence of that fact.

Appellants appear to contend in their Jurisdictional Statement at page 7 that the construction placed upon Section 203 (b)(8) by the District Court would thwart the legislative purposes of Congress in enacting the Motor Carrier Act of 1935 and frustrate the remedial aspects thereof by exempting the operations in question from the certificate requirements of the Act, because the Act was adopted to stabilize the motor carrier industry through regulation. Such argument might be compelling and convincing if Congress had not seen fit to exempt many types of transportation from the requirement that authority be obtained from the Interstate Commerce Commission to perform such transportation instances of which exemptions have just been discussed. Obviously, the legislative purposes of Congress will be no more thwarted by the construction placed upon Section 203 (b)(8) by the District Court in these causes than they have been by constructions of other portions of Section 203 (b) by the Courts and the Interstate Commerce Commission.

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[10] *The 69th Annal Report to Congress by the Interstate Commerce Commission*, page 128 (1955).

4. Appellants' Jurisdictional Statement Does Not Establish That the Question Present Here Is Substantial.

Appellees respectfully submit that the Jurisdictional Statement filed by appellants herein does not establish that the question on which the decision of the causes herein depend is substantial enough to need further argument. As has been previously pointed out, the construction placed upon Section 203(b)(8) by the District Court neither thwarts the legislative purpose of Congress in enacting the Act of which such section is a part nor frustrates any remedial purpose of the Act. Furthermore, as has been earlier developed herein, the construction of Section 203 (b)(8) adopted by the District Court is not only reasonable, logical and consistent but is also in accord with the plain and unambiguous language of the statute. It is obviously in accord with the intent of Congress in enacting the statute.

One of the reasons advanced by appellants why this Honorable Court should consider the question presented here as substantial is that the construction placed upon Section 203(b)(8) by the District Court will create difficulties in connection with the enforcement of the Interstate Commerce Act. The difficulties mentioned relate primarily to the question of determining whether the transportation in question was being conducted wholly within the exempt zone or area or beyond. This problem obviously is present in connection with any transportation performed under the exemptions granted by Section 203 (b) of the Interstate Commerce Act whether the transportation is performed wholly within the United States or in part in the United States and in part in a foreign country. In each and every instance it is a question of fact not difficult of ascertainment

as to between what points and under what circumstances the transportation is being performed. It is significant that the Interstate Commerce Commission, which is charged with responsibility for enforcing the Interstate Commerce Act, does not appear to feel that any particular enforcement problem would be created by the construction of Section 203 (b)(8) adopted by the District Court. This is evident from its decision not to prosecute its appeals from the decisions of the District Court as well as from the statement made by its in its 69th Annual Report to the Congress indicating its desire to be rid of the responsibility of regulating any phases of the transportation herein involved, except those relating to such things as hours of service of employees and safety of operations.

This particular contention of appellants demonstrates the inconsistency of their position. On the one hand they seem to say that the considered statutory provision should not be given its plain meaning because this would make enforcement of the Interstate Commerce Act by the Interstate Commerce Commission contingent upon activities in a foreign country, and the Commission should not have to look to and consider such activities in a foreign country. On the other hand, they state that transportation between a foreign country and the United States can and should be considered in determining what carriers are to be regulated. In effect, they are contending that Congress intended to look beyond the territorial limits of the United States and permit the Commission to do so for the purposes of deciding what carriers are to be regulated and in regulating them, but that Congress could not have intended to have considered anything beyond the territorial limits of the United States in prescribing the exemption here involved. This position is without sound basis in logic or reason.

In any event, in view of the clear and unambiguous language of the statute, even if the construction adopted by the District Court herein were to create enforcement difficulties, this would confer no authority on the Court to change the plain meaning of the statute or to read language into the statute.

Appellants also seem to contend that there is a substantial question herein because certain of them them have been engaged in the transportation of property between Detroit and Windsor since 1935 under authority granted by the Commission and they would be faced with disastrous competition if the decision of the lower court is affirmed. Several of the appellants did not, however, obtain their authority from the Commission until after appellees had started operating and until after November of 1946 when the Commission for the first time clearly took the position that authority was required from it to conduct transportation operations such as those involved. Carriers such as appellees and others were conducting transportation operations between Detroit and Windsor under the belief they were exempt as late as 1951 and 1952, without any advice from the Interstate Commerce Commission that they were not exempt. All during this period from 1935 through November 1946 and up until the time of the hearings on the applications of appellees, certain appellants holding authority from the Commission were competing with carriers operating under the belief their operations were exempt. Despite that fact appellants are still in business. It is apparent from the records of the proceedings before the Interstate Commerce Commission on the applications of the appellees herein that appellants have continued to grow and to profit from their operations.

The effect, however, that the construction of Section 203(b)(8) may have upon certain carriers does not con-

stitute any basis for changing the plain and unambiguous language of the statute. It is inevitable that any decision which construes the language of Section 203(b) of the Interstate Commerce Act as having a meaning other than that adopted by the Interstate Commerce Commission over a period of years with the result that transportation considered non-exempt by the Commission is held exempt by the Courts will affect the competitive position of carriers which have obtained authority from the Interstate Commerce Commission. Yet this has not prevented the Courts from, over the years, giving the language of Section 203(b) of the Interstate Commerce Act a different interpretation than that given it by the Commission. For example, the Commission has always considered the transportation of frozen fruits and vegetables, in interstate or foreign commerce, as non-exempt, and granted numerous carriers authority to perform such transportation, yet this Honorable Court has recently sustained District Court decisions construing such transportation as exempt.[11] The Interstate Commerce Commission up to then had consistently held that the transportation of frozen fruits and vegetables was non-exempt under Section 203 (b)(6) and granted authority to numerous carriers. The Commission has not been nearly so consistent in construing Section 203 (b)(8) as it applies to transportation of property between Detroit and Windsor. As has been previously pointed out for the first eleven or so years after the Motor Carrier Act of 1935

[11] *Frozen Food Express v. United States* (D. C. Tex., 1956), 148 F. Supp. 399, aff'd per curiam Oct. 14, 1957, 2 L. Ed. 2d 22; *Interstate Commerce Commission v. Home Transfer & Storage Co.*, 352 U. S. 884, 77 S. Ct. 129, 1 L. Ed. 2d 82, affirming *Home Transfer & Storage Co. v. United States* (D. Ct. Wash. 1956), 141 F. Supp. 599.

was enacted, the Commission appeared to consider such operations exempt and not until November of 1946 did it begin to adopt a consistent interpretation of the statute as relating to such transportation. Obviously, if a consistent construction of Section 203(b)(6) by the Interstate Commerce Commission and the granting of authority to carriers in accordance with such interpretation created no basis for holding that the transportation of frozen fruits and vegetables in interstate or foreign commerce was non-exempt under such section, the inconsistent interpretation adopted by the Commission of the language of Section 203(b)(8) so far as it relates to the transportation here involved and the granting of some authority could hardly be said to create any basis for holding the transportation here involved to be non-exempt.

CONCLUSION

The foregoing contentions were raised before the District Court, and after careful consideration rejected. It is, therefore, respectfully submitted that, as held in the well considered opinions of the District Court, the transportation of property by appellees between Detroit, Michigan and points in the Detroit Commercial Zone, on the one hand, and, on the other, Windsor, Ontario, Canada, is exempt under Section 203 (b)(8) of the Interstate Commerce Act from the certificate requirements of the Act; and that since the question on which the decision of the causes involved depends is so unsubstantial as to need no further argument, the Opinions and Orders of Permanent Injunction of the District Court should be affirmed.

Respectfully submitted,

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